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No. 86-1322

In the Supreme Court of the United States

OCTOBER TERM, 1986

AAACON AUTO TRANSPORT, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The court of appeals found that overwhelming evidence supported the Interstate Commerce Commission's decision to revoke all of petitioner's operating authority because of its persistent consumer abuses in violation of the agency's 1976 cease and desist order. Petitioner does not dispute the substantiality of the evidence but seeks review of claimed procedural infirmities.

1. Petitioner was a common carrier licensed by the Interstate Commerce Commission to transport auto-

mobiles in driveaway service[1] between all points in the United States. After numerous consumer complaints, the Commission issued an order in 1976 directing petitioner to cease and desist from certain abusive and unlawful practices.[2] *AAACon Auto Transport—Invest. & Revoc. of Certif.*, 124 M.C.C. 493 (1976). The cease and desist order provided that "upon the willful failure of [petitioner] to comply with any of the provisions of this order, the certificate issued to [petitioner] in No. MC-125808 and subnumbers thereunder, may be suspended or revoked in whole or in part" (124 M.C.C. at 511; see Pet. App. B122). The court of appeals affirmed (*AAACon Auto Transport, Inc.* v. *ICC*, 553 F.2d 93 (2d Cir. 1977) (Table)).

Because the Commission kept receiving consumer complaints, it began a proceeding in February 1978 to determine whether petitioner had violated the cease and desist order and, if so, whether the Commission should suspend or revoke any or all of petitioner's operating authority. In 1979 the Commission received an initial decision from administrative law judge (ALJ) Benice, who, after conducting 16 days of proceedings without taking any evidence into the record (Pet. App. A13, B140), accepted petitioner's "offer of settlement"—a 10-day cessation of operations—over the objection of the Bureau of Investigations and Enforcement (*id.* at B132). The Commission rejected the settlement offer, vacated ALJ Be-

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[1] In such service the carriers provide drivers, for hire, to drive persons' automobiles from one place to another.

[2] The proceeding was instituted pursuant to Section 204(c) of the Interstate Commerce Act (now recodified at 49 U.S.C. 11701(a)), and pursuant to Section 212(a) (recodified at 49 U.S.C. and 10925(b) and (c)).

nice's initial decision, and remanded the proceeding for continued hearings before another ALJ better able to move the proceedings (*id.* at A13, B127-B149).

In February 1983, on an evidentiary record including the testimony of 80 witnesses, 592 evidentiary exhibits, and more than 15,000 pages of transcript, ALJ Sarbacher issued his initial decision recommending permanent revocation of all of petitioner's operating authority for willful violations of every provision of the agency's 1976 cease and desist order. In 1984 the Commission affirmed Judge Sarbacher's decision and revoked all of petitioner's operating authority (Pet. App. B3-B116).

The court of appeals unanimously denied a petition for review (Pet. App. A1-A17). It found that the evidence of petitioner's violation of the 1976 cease and desist order was "overwhelming" (*id.* at A5; see also *id.* at B108-B109) and rejected all of petitioner's claims of procedural error (*id.* at A6-A16).

2. Petitioner seeks review in this Court of the rejection by the court of appeals of claims of procedural infirmities. None of petitioner's arguments is sound. There is no conflict with any decision of this Court or another court of appeals, and there is no reason for further review.

a. The court of appeals held that the Commission properly exercised its discretion, after reversing ALJ Benice's initial decision, to reassign the case to another ALJ better able to handle it efficiently (Pet. App. A11-A13). Petitioner admits that it cannot show a Commission abuse of discretion (Pet. 16).[3]

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[3] The court of appeals, of course, recognized that it would be an abuse of discretion for any agency to reassign ALJs with

Petitioner instead argues that the Commission had no discretion at all to reassign the case unless it first removed ALJ Benice for bias or disqualification under 5 U.S.C. 556(b) (Pet. 7-24). This argument is insubstantial.

This Court has long held that agencies have broad discretion in shaping their procedures (*FCC* v. *Schreiber*, 381 U.S. 279 (1965)) and that a substantial measure of this discretion applies to the assignment of ALJs to hear cases. *Ramspeck* v. *Federal Trial Examiners Conference*, 345 U.S. 128, 139-140 (1953). Moreover, the relevant section of the Interstate Commerce Act, 49 U.S.C. 10305(a), and Section 11 of the Administrative Procedure Act (APA) (recodified at 5 U.S.C. 3105),[4] together authorize the Commission in its sound discretion to reassign a case on administrative remand to another ALJ. In light of these statutes and *Ramspeck*, there can be no doubt that, had the Commission known in advance that

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the intent or effect of interfering with ALJ independence or denying a party a fair hearing (Pet. App. A12). The court expressly found that "Aaacon has not, however, established that this was the ICC's intention or that the switch was in any way prejudicial to Aaacon" (*id.* at A12-A13). The fact that Judge Sarbacher's rulings may have differed from Judge Benice's (see Pet. 16-21) does not establish error, since petitioner was not entitled to a hearing before a particular ALJ.

[4] The Interstate Commerce Act reads in pertinent part: "The Interstate Commerce Commission may delegate to * * * an employee appointed under section 3105 of title 5, a matter * * *. The Commission may change or rescind a delegation under this subsection at any time." 49 U.S.C. 10305(a). The Administrative Procedure Act reads in pertinent part: "Administrative law judges shall be assigned to cases in rotation *so far as practicable.*" 5 U.S.C. 3105 (emphasis added).

ALJ Benice would succumb to petitioner's dilatory tactics,[5] it would have been within its discretion to depart from its rotation and assign the case to another ALJ. *Ramspeck*, 345 U.S. at 139-140. The Commission was equally within its discretion to assign the case to another ALJ on remand, when it discovered the problem in the course of reversing his initial decision.

Section 7(b) of the APA (recodified at 5 U.S.C. 556(b)), in no way detracts from this agency power (see Pet. 13), for it deals with a very different subject. It provides that a party may by affidavit alleging "personal bias or other disqualification" challenge an ALJ's hearing of a case, and it requires the agency in its decision to determine the matter. As the court of appeals observed (Pet. App. A11), that statute does not address the right of an agency to reassign a case on administrative remand for the more efficient conduct of agency business, and the subject that it does address—bias or disqualification of an ALJ—is not at issue in this case.

b. Section 11701(c) of 49 U.S.C., as amended by Section 26(a) of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 818, requires certain proceedings to be "dismissed automatically" unless concluded by the Commission within three years after they are begun. Petitioner contends that Section 11701(c) applies retroactively to require dismissal of this proceeding (Pet. 24-25), which was already well underway when the Motor Carrier Act took effect (Pet.

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[5] Contrary to petitioner's claim (Pet. 11), the Commission specifically pointed to the 16 days of proceedings with "no real evidence" and a "war of attrition" successfully waged by petitioner's counsel as "a monument to dilatory conduct" and as the basis for assigning the case on remand to a new ALJ (Pet. App. B140-B141).

App. A11) but was concluded more than three years later. That argument is both unimportant and wrong.

Almost seven years have passed since enactment of the Motor Carrier Act in July 1980, and no investigations begun before that date are still pending at the Commission. Thus the Act's retroactivity is not an issue of any general importance.

Moreover, as the court of appeals held, there is no reason to think that Congress wanted the three-year limit of 49 U.S.C. 11701(c) to apply retroactively to proceedings that were already well underway when the statute was enacted (Pet. App. A6-A12). The agency, whose consistent interpretation of its own statute is entitled to deference (*Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843 (1984)), has specifically determined that Section 11701(c) is not retroactive (*In re Louis J. Amato*, 367 I.C.C. 821, 825 (1983)), and the courts have held that the Motor Carrier Act is not retroactive in general.[6]

The derivation of Section 11701(c) supports the Commission's reading. Section 11701(c) derives directly from the former Section 17(14)(a) of the Interstate Commerce Act, 49 U.S.C. (1976 ed.) 17(14)(a). That provision, enacted in 1976 (Pub. L. No. 94-210, § 303(b), 90 Stat. 50), was expressly pro-

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[6] *Curtis, Inc.* v. *ICC*, 669 F.2d 648, 651 n.3 (10th Cir. 1982); *Watkins Motor Lines, Inc.* v. *ICC*, 641 F.2d 1183, 1186-1187 (5th Cir. 1981); *Hunt Transportation, Inc.* v. *ICC*, 636 F.2d 190 (8th Cir. 1980) (by implication); *Midwestern Transportation, Inc.* v. *ICC*, 635 F.2d 771 (10th Cir. 1980) (by implication); *Sharron Motor Lines, Inc.* v. *United States*, 633 F.2d 1115 (5th Cir. 1981) (by implication); cf. *Burlington Northern, Inc.* v. *United States*, 679 F.2d 915 (D.C. Cir. 1982) (Staggers Rail Act of 1980 not applied to proceeding pending on Act's effective date).

spective in application. By comparison, it had a companion provision, Section 17(14)(b), enacted simultaneously, that was retroactive and directed the Commission to finish within one year all formal investigations then pending for three years. 49 U.S.C. (1976 ed.) 17(14)(b). When Congress recodified the Interstate Commerce Act in 1978, it replaced Section 17(14)(a) with the new Section 11701(c). See 49 U.S.C. (Supp. II 1978) 11701(c). In the Motor Carrier Act of 1980, Congress applied this Section for the first time to motor carriers but did not include a retroactive companion provision, as it had done in applying the time limit to rail carriers in 1976.[7] Thus the court of appeals correctly attached significance to the absence of any retroactive provision (Pet. App. A7 n.4).[8]

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[7] In a written submission, Chairman Gaskins of the Commission suggested that Congress include in Section 11701(c) a provision much like former Section 17(14)(b). See *Examining Current Conditions in the Trucking Industry and the Possible Necessity for Change in the Manner and Scope of Its Regulations: Hearings on H.R. 6418 Before the Subcomm. on Surface Transportation of the House Comm. on Public Works and Transportation*, 96th Cong., 2d Sess. Pt. 3, at 1107, 1110 (1980). Congress's failure to do so hardly supports the inference petitioner would draw (see Pet. 32) that Congress intended Section 11701(c) to be fully retroactive rather than wholly prospective.

[8] The court of appeals was also right in applying *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974), to conclude that a retroactive application of the statute on the facts of this case would be unjust. To terminate the proceedings would imprudently disrupt an administrative process that was well underway when the new statute became law, would needlessly waste private and government resources, and would frustrate the fundamental congressional policy that the Motor Carrier Act be implemented so as to minimize turmoil (Pet. App. A8-

The court's resolution of the Section 11701(c) issue is independently supported by a ground on which the court did not rely. The explicit directive of Section 11701(c) is that a formal investigative proceeding begun *under 49 U.S.C. 11701(a)* be finished in three years or automatically be dismissed. That directive does not apply to revocation of authority for violation of a cease and desist order, because such revocation proceedings are not begun under Section 11701(a). Investigations contemplated by 49 U.S.C. 11701(a) are by definition for violation of "this subtitle." In this case, however, the Commission held a full Section 11701(a) investigation years ago, found violations, and entered a cease and desist order. The questions before the Commission in this proceeding were whether there was a willful violation of the cease and desist order and, if so, whether to revoke petitioner's authority. And 49 U.S.C. 10925(c), which governs license revocations and requires that a proceeding to revoke a license be preceded by a compliance order entered in a 49 U.S.C. 11701 proceeding, names only the initial compliance order proceeding as being subject to 49 U.S.C. 11701. Had Congress intended that the subsequent enforcement action also be governed by that provision, it would have been easy to say so.

c. Petitioner's essentially factual claim (Pet. 35-49) that it did not receive notice that all of its certificates were at risk in the revocation proceeding is groundless, for reasons stated exhaustively by the

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A11). As the court recognized, the Commission could simply begin another enforcement action (*id.* at A10). Petitioner's claim that a renewed proceeding would violate the Double Jeopardy Clause (Pet. 27, 34-35) is wrong because the Clause does not apply in non-criminal proceedings of this sort.

Commission (Pet. App. B61-B73). The original cease and desist order plainly stated that "upon the willful failure of [petitioner] to comply with any of the provisions of this order, the certificate issued to [petitioner] in No. MC-125808 *and subnumbers thereunder*, may be suspended or revoked in whole or in part" (124 M.C.C. at 511 (emphasis added); see Pet. App. B122). The February 1978 notice that commenced the revocation hearing mentioned only the Sub-No. 1 authority because that was the *only* license petitioner held at the time (Pet. App. B62). As the court of appeals correctly noted (*id.* at A15-A16), more expansive grants merely built on the original Sub-No. 1 certificate but did not moot the underlying revocation proceeding. Indeed, the evidence concerning petitioner's illicit activities went to its operations as an overall corporate entity and was never segregated by individual license number. The court of appeals also correctly explained (*id.* at A13-A14) that petitioner certainly had actual notice, once the hearing got underway, that its entire operation, *i.e.*, *all* of its operating authority, was at risk. See *National Steel & Shipbuilding Co.* v. *Director, Office of Workers Compensation Programs*, 616 F.2d 420, 421 (9th Cir. 1980).[9]

d. Petitioner has raised as a question presented the constitutionality of a so-called "gag order." Petitioner, however, has not presented any argument concerning this point in its petition, other than an

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[9] Petitioner's claim that the court of appeals ignored several of its arguments (Pet. 37-40) is groundless. The court discussed the most salient arguments expressly (Pet. App. A13-A16) and considered and rejected all other contentions (*id.* at A5 n.1).

unelaborated repetition of the allegation in its argument about reassignment of the case on administrative remand to another ALJ (Pet. 17), and has thus waived the argument.[10]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[10] In any event, it is insubstantial. For three years after the start of the revocation proceeding in February 1978, petitioner was totally free to contact any witness it wished and conducted extensive discovery. In the spring of 1981, petitioner asked ALJ Sarbacher for permission to take yet more depositions and simultaneously sent copies of its petition to numerous witnesses, requesting that they travel substantial distances on short notice to depositions not yet authorized by the ALJ. The ALJ denied petitioner's request for yet more discovery, scheduled trial, and required that petitioner thereafter obtain either Commission counsel's consent or the ALJ's approval before contacting any witnesses. ICC Case No. MC-C-7287 (Decisions of May 27, 1981, and June 30, 1981). The order was an appropriate prophylactic measure to prevent burdens on third parties. Moreover, as the Commission held, petitioner failed to demonstrate how the order in any way prejudiced it (Pet. App. B59-B60).

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